No. 21709

In the

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

WILLIAM WARDEN DUNCAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief of Appellant

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JURISDICTION

Appellant William Warden Duncan was convicted on two counts of violation of Title 18 U.S.C. Sec. 2313 (R. 1-2). Judgment was entered on January 9, 1967. Notice of appeal was duly filed (R. 29) and the matter brought here under 28 U.S.C. Sec. 1291. The appellant was sentenced to five

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*In accordance with the Rules, we have brought up the record by photocopy and the transcript by typescript. The transcript of the trial was produced by the reporter below in one volume which will be identified here as "T." The record itself will be identified by the letter "R." A transcript taken at the pre-trial will be identified as "P.T."

years and fined $500 on each count, the sentences to run concurrently (R. 28).

STATEMENT OF THE CASE

A. Introduction.

This case involves the alleged receiving and concealing of two stolen motor vehicles moving in interstate commerce from Los Angeles, California to Phoenix, Arizona. The vehicles, a 1961 Chevrolet Impala and a 1964 Chevrolet Impala Supersport, were allegedly received and concealed on September 11, 1965 and October 18, 1965, respectively. The appellant and another, Judson Wesley Rainey, were charged with the offenses. The appellant's motion for separate trial (R. 21-22) was granted and his case proceeded to trial first.

B. Pre-trial Motion for Bill of Particulars.

On October 6, 1966 the defendant filed a motion for bill of particulars, twenty-two in number, (R. 9-11) requesting certain basic information regarding the facts and circumstances of the charges. Among the particulars inquired of was from whom and where the cars had been received, where they were concealed, whether either of the defendants drove the cars, and the pertinent dates of these activities. (For the convenience of the Court the entire bill of particulars is attached as an appendix). The motion

was denied as to all twenty-two of the particulars; the government in its response to particulars number 21 and 22 stated that it knew of no material evidence favorable to the defendant. After denying the motion, the court suggested that counsel informally confer with a view towards the government making more information available to the defendant. As a result of this conference, the following information was made available to the defendant (R. 19-20): the place of receipt and concealment of the automobiles (Phoenix, Arizona) and the serial number, owner and color of each of the vehicles.

Maintaining that they were unable to learn even basic information from a defendant who steadfastly maintained his innocence, defense counsel at the pre-trial conference on December 8, 1966, five days before trial, asserted that they were unable because of lack of specificity to develop the defense of alibi or otherwise prepare an adequate defense (P.T. 2-3). Both defendants then offered to open their files upon the government doing likewise in accordance with Rule 17.1, Federal Rules of Criminal Procedure, and the suggestions of the Committee on Pre-trial Procedure as set forth in 37 F.R.D. 95 (1965). The government refused (P.T. 5). The defendant then proceeded to trial knowing absolutely nothing other than the minimal information

contained in the indictment, the serial number, owner and color of the vehicles, and the alleged place of receipt and concealment.

C. The Evidence.

Although nine persons testified for the government, essentially the defendant was convicted on the testimony of one person, Robert Menz, a convicted felon whose crimes included filing a false claim with the United States government (T. 48). The prosecution's first witness, Penny Moyers, simply established the ownership of the 1961 Chevrolet Impala in a California used car dealer on September 9, 1965 (T. 19); the next witness, Rollis Boggs, likewise established ownership of the 1964 Chevrolet Impala Supersport in a California automobile dealer as of October 15, 1965 (T. 22).

Robert Menz testified that he had stolen and transported the 1961 Chevrolet Impala to Phoenix following a telephone call to the defendant (T. 32). Upon arrival, Menz, upon instructions, delivered the car to a Club Lido where Menz was met by the defendant and Judson Rainey (T. 35). The defendant and Rainey, unaccompanied by Menz, then went outside and examined the car (T. 35) and Menz was directed to deliver it to another bar where he received a "commission" from Duncan (T. 36). Menz then returned to California without

further incident (T. 36). At no time was the defendant physically placed in either of the cars by the witness Menz (T. 55, 57) or, indeed, by anyone else.

Menz allegedly delivered on or about October 15, 1965, the 1964 Chevrolet again following a call to Duncan (T. 37-38) who supposedly expressed an interest in such an automobile. The car was again driven by Menz to the Club Lido (T. 42) where Menz was met by the defendant and Rainey and the car was then transported by Menz to another bar (T. 42); the defendant allegedly again paid Menz a commission (T. 43). Two months later the defendant and Menz conversed in Phoenix regarding the fact that the Federal Bureau of Investigation had picked up both automobiles (T. 47-48). At the time he testified, Menz was incarcerated (T. 49) for the theft of another vehicle; he was never charged with the theft of the two cars supposedly received by the defendants (T. 49).

Beverly Harrell, the next witness, testified that in the "early fall" of 1965, while staying at the Duncan home, she on one occasion used a white Chevrolet of undetermined vintage--1960, 1961 or 1962 (T. 63, 64, 67). Mrs. Harrell testified that the car she drove could be operated without a key (T. 65). A motion to strike her testimony, as without proper foundation and identification

of the vehicle in question, was denied (T. 65) as was the earlier objection to lack of proper foundation (T. 63). The motion to strike was renewed at the end of the government's case and again denied (T. 109-110).

Ruby Lowry of the Arizona State Highway Department testified that she had searched the department's records for the year 1965 without finding a registration for either car in the defendant's name (T. 69). Vernon Hurst testified that upon his return from San Diego he found the two cars at his body shop (T. 72); he at no time connected the defendant Duncan to either of the cars (T. 81). Yvonne Hurst likewise in no way connected the defendant Duncan to the case, though testifying that Rainey had brought the two cars to her house and that they had been kept there for several weeks (T. 87). Daniel Barker, a Phoenix Police Officer, and Kenneth Pless of the F.B.I. likewise in no way tied the vehicles to the defendant Duncan. In summary, only two witnesses ever connected the appellant to the 1961 automobile, Menz and Bevery Harrell, and only one witness, Menz, tied the defendant in any way to the 1964 automobile.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 18 U.S.C. Sec. 2313:

> "Whoever receives, conceals, stores, barters, sells, or disposes of any motor vehicle or aircraft, moving as, or which

is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

United States Constitution, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

SPECIFICATIONS OF ERROR

1. The court below erred in refusing to grant appellant's motion for a bill of particulars for the reason that without the requested basic information the defendant was not apprised of "the nature and cause of the accusation" against him as required by the Sixth Amendment.

2. The court below erred in refusing to strike the testimony of Beverly Harrell for the reason that it was vague and uncertain and no proper foundation for her testimony regarding the 1961 automobile was ever established; at trial the testimony was specifically objected to as not material without further foundation (T. 63), not connected to the issues in the case (T. 65), immaterial (T. 109) and irrelevant (T. 109); the substance of the testimony was that in the "early fall" of 1965 the witness drove a

white Chevrolet of uncertain vintage, 1960, 1961 or 1962 (T. 63, 67).

QUESTIONS PRESENTED

1. Should a defendant, who has moved in timely fashion for more information, have to stand trial knowing as to the nature and cause of the accusation only the information provided by a bare bones indictment particularly when defense counsel has offered to open their files to the government?

2. Can a defendant be lawfully convicted of receipt and concealment of a 1961 vehicle in part on testimony that establishes only that the defendant allowed the witness on one occasion to use an automobile of the same color and make, both extremely common, though the witness cannot state the age of the car she drove or any other distinguishing feature?

SUMMARY OF ARGUMENT

The first issue presented by this case is whether, consistent with due process and the specific mandates of the Sixth Amendment, a defendant can be compelled to stand trial equipped essentially only with the knowledge provided by the form pleading. While the indictment in the instant case undoubtedly would have withstood a motion to quash, it was not sufficiently detailed to warrant the denial of the

defendant's motion for a bill of particulars (R. 9-11). The various courts of appeals have uniformly held in an analogous situation that a motion for a bill of particulars is the appropriate way to "flesh out" the pleading skeleton. In the instant case, the trial court abused its discretion in not requiring the prosecution to make available to the defendant basic facts concerning the charges. It is no answer, under our cherished system, to argue that the defendant must know these facts; as pointed out by Judge (later Justice) Whittaker in United States v. Smith, 16 F.R.D. 372 (W.D. Mo. 1954), a classic discussion, this argument presumes the defendant guilty rather than, as must be the case, innocent. The error in this case was aggravated by the government's refusal, despite the defendant's offer to do so, to open its files for mutual discovery as proposed by the Judicial Committee on Pre-trial Procedure, 37 F.R.D. 95 (1965).

The second issue is whether the trial court abused its discretion in not striking upon timely motion and objection vague testimony regarding an automobile driven on one occasion by the witness with the permission of the defendant. The car involved in Count I was a white 1961 Chevrolet Impala. The witness Harrell testified that on one occasion she used a white Chevrolet parked in the driveway of the

defendant's home. The witness, despite a leading question by the prosecution, refused to state that the car was a 1961 Chevrolet, stating only that it was approximately a 1960, 1961 or 1962 white Chevrolet. She could not recall the number of doors or anything else that meaningfully established that the car she drove was the car referred to in Count I. The fact as testified to by both Harrell and Menz, that the car could be operated without a key, is not in any way significant since all Chevrolets of this approximate vintage can be operated without a key if the ignition is left in other than the lock position. (See testimony of the automobile repairman Vernon Hurst in this regard (T. 78)). The admission of the testimony is particularly aggravated since no one, not even the government's informer, Menz, placed the defendant Duncan in possession of the vehicle. It may well be that this skimpy, vague and without foundation testimony tipped the scales, in the jury's mind, against the defendant. The evidence was not merely repetitive of the fact of possession of the automobile by Duncan; it was the only testimony, however tenuous, establishing control by the defendant of the vehicle. Under these circumstances we submit that it was an abuse of discretion for the trial court not to strike the testimony.

ARGUMENT

I. Because of the Skeleton Pleading of the Indictment, Denial of Motion for a Bill of Particulars Violated Defendant's Constitutional Right to be Informed of the Nature and Cause of the Accusation.

The defendant, along with his co-defendant, Judson Wesley Rainey, was charged (in typical barebones fashion) with the knowing receipt and concealment of two stolen motor vehicles. Each of the two counts of the indictment simply charged the defendant in the words of the statute and provided as concrete information only the following: the approximate date of the offense, the year, model and manufacturer of the vehicle, the points between which the automobile was moving, and that the receipt and concealment was somewhere within the State of Arizona. Specifically omitted from the indictment was such basic information as from whom the vehicle was received, where it was received and concealed, and whether either of the defendants drove the motor vehicle. The trial court's failure to require the government to specify the exact dates and times involved precluded any efforts to develop an alibi: a time-honored and valid defense. No person, absent the most unusual circumstances (e.g. hospitalization), can specifically state where he was "on or about the 11th day of September, 1965" or "on or about the 18th day of October, 1965." Given the modern day emphasis on statutory pleading, and the generalities

allowed by Rule 7(c) of the Federal Rules of Criminal Procedure, the indictment was sufficient to withstand a motion to quash. However, as repeatedly noted by the federal courts, the rules must be read as a uniform whole; in this instance as a delicate counterbalancing of the rights of the defendant under the inexorable command of the Sixth Amendment to be advised of the nature and cause of the accusation and the government's right not to be entangled in a web of pleading technicalities. However, because we are dealing with a constitutional privilege, any statutory inroads are to be construed strictly. Russell v. United States, 369 U.S. 749, 82A Sup. Ct. 1038, 8 L. Ed. 2d 240 (1962). The Supreme Court in Russell, discussing the protections afforded by an indictment, made it clear that the:

> ". . . basic principles of fundamental fairness retain their full vitality under modern concepts of pleading, and specifically under Rule 7(c) of the Federal Rules of Criminal Procedure, [as] is illustrated by many recent Federal decisions." (369 U.S. at 765-66, 82A Sup. Ct. at 1048).

However, the defendant's quarrel is not with the indictment as such, but rather with the failure of the trial court to compel the government to disclose anything beyond the information contained in the indictment. The defendant's request through a bill of particulars for basic information concerning the alleged offenses (R. 9-11) was specifically denied as to each particular requested. As a result of

negotiation suggested by the trial court following denial, counsel for the defendant additionally learned from the government that the alleged place of concealment was Phoenix, Arizona (a city encompassing approximately 187 square miles according to the Statistical Abstract of the United States, 1965), the serial number of each of the vehicles, and the parties in possession of the vehicles at the time of theft. Beyond this, counsel for the defendant was totally ignorant of the essential facts of the case until Robert Menz, a convicted perjurer (T. 48-49), testified as the government's third witness. Upon such short notice defense counsel was totally unable to develop an effective cross-examination or impeaching material. There was simply no way for the defendant upon such short notice to check out the witness's story as to dates, times and places. Nor, as already noted, did defendant have any opportunity to establish the defense of alibi or inability. The case represents--in this supposedly enlightened day and age--a classic throwback to the era of "blind man's bluff" litigation. The refusal of the trial court to grant any aspect of the motion is particularly ironic, coming as it does on the heels of the amendment of Rule 7(f) "to encourage a more liberal attitude by the courts towards bills of particulars without taking away the discretion which courts must have in dealing with such motions

in individual cases." (Committee Note to 1966 Amendment to Rule 7(f)).

Simply stated, it is the defendant's position that the trial court abused its discretion by not making available to the defendant before trial at least the rudimentary facts of the offenses. To state that this area is discretionary, as defendant must concede is the case, Cook v. United States, 354 F.2d 529 (9th Cir. 1965), does not provide the answer unless the review function is to be abrogated totally. It is submitted that on these facts there can be only one conclusion: the trial court erred in not granting the motion for a bill of particulars. The government's hackneyed phrase in its motion in opposition to the motion for a bill of particulars, that is, that the material sought is "evidentiary" (R. 15), certainly is not a proper basis for the exercise of discretion; the particulars sought were very limited and restrained and truly pertinent to the allegations of the indictment. The government, sanctioned by the trial court, has simply adopted the advantages of notice pleading without accepting the requirements of disclosure imposed by the other sections of the Rules.

In Lauer v. United States, 320 F.2d 187 (7th Cir. 1963) the Seventh Circuit ruled that an indictment charging the sale of narcotics in violation of Sec. 4705(a), 26 U.S.C.,

was defective in that it did not set forth the name of the purchaser. The identity of the purchaser of narcotics in cases such as Lauer is completely analogous to the identity of the transferor of the automobiles in the instant case. Therefore, these narcotics cases, and what the courts have said about them, will be examined at some length.

The Lauer decision has been criticized by the other courts of appeals, including the Ninth Circuit, and was finally overturned by the Seventh Circuit itself in Collins v. Markley, 346 F.2d 230 (7th Cir. 1965) cert. denied, 382 U.S. 946, 86 Sup. Ct. 408, 15 L. Ed. 2d 355 (1966). However, in distinguishing or refusing to follow Lauer, the various courts of appeals, including this one, strongly emphasized not that the information should be withheld, but rather that the defendant should develop the facts through a bill of particulars rather than challenging the sufficiency of the indictment itself. It is fair to state that the reviewing courts simply assumed as a matter of course that the information would be supplied upon proper motion.

Even in the case which reversed Lauer, Collins v. Markley, supra, the Seventh Circuit took pains to point out that the defendant was well aware of the identity of the purchaser and that the court was not reaching the situation "where . . . the name of the purchaser is not stated in the

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indictment and the defendant, before trial, has demanded the disclosure of such name, and such name has not been disclosed." In McDowell v. United States, 330 F.2d 920 (10th Cir. 1964) cert. denied, 377 U.S. 1006, 84 Sup. Ct. 1944, 12 L. Ed. 2d 1055 (1964), the Tenth Circuit, answering an argument similar to that employed in Lauer, pointed out that there had been no effort to procure the purchaser's name before trial. By way of contrast, the defendant in the present case not only filed a bill of particulars but also, pursuant to the suggestion of the Committee on Pre-trial Procedure in 37 F.R.D. 95 (1965), offered at the pre-trial to exchange files with the government (P.T. 2-5).

The district court in Taylor v. United States, 224 F. Supp. 82 (W.D. Mo. 1963), also responding to an argument that the indictment was defective for failing to name the purchaser of the narcotics, emphasized the role of the bill of particulars in giving flesh to the pleading skeleton.

> "In a case involving an indictment or information in the standard form as is involved in this case, we believe that most district judges, and certainly the district judges that serve this Court, would, upon a proper showing, sustain a motion for a bill of particulars as a matter of course.
>
> "The acceptance of the theory of notice pleading by the Rules of Criminal Procedure may not be viewed in isolation. Those rules must be viewed as a coordinated system for the administration of criminal justice. Particular attention must therefore be focused

on the rules providing for discovery. See Bowman Dairy Co. v. United States, 341 U.S. 214, 71 S.Ct. 675, 95 L.Ed. 879 (1951).

> "But the question of whether discovery should be permitted is an entirely different question from whether an indictment or an information is fatally defective. In regard to the former question, Mr. Justice Brennan, in his article 'The Criminal Prosecution: Sporting Event or Quest for Truth?', 1963 Wash. U.L.Q. 279, 293, recognized that 'the extent to which discovery should be allowed in particular cases will present complex problems. There will be questions for the exercise of sound discretion depending upon the particular materials of which discovery is sought. * * * In other words, there will be much need for the striking of a proper balance in individual cases'". (224 F. Supp. at 84-5).

On appeal, the district court's philosophy was sustained, the appellate court reiterating that "a motion for a bill of particulars would undoubtedly have brought forth the information claimed to be lacking." Taylor v. United States, 332 F.2d 918, 921 (8th Cir. 1964).

In United States v. Dickerson, 337 F.2d 343 (6th Cir. 1964), Lauer was again criticized and not followed, but, much more importantly to the present discussion, the court pointed out that "[i]f for any reason defendant had needed more information at an earlier date, he had available a motion for a Bill of Particulars under Rule 7(f)." (See also United States v. Debrow, 346 U.S. 374, 74 Sup. Ct. 113, 98 L. Ed. 92 (1953), where the Supreme Court makes precisely the same point.)

The foregoing discussion, which could be continued at length, without profit, makes it clear that if the prosecution wishes to adopt the convenience of notice pleading it may do so, provided, however, that it does not thereby jeopardize the defendant's constitutional right to know the nature and cause of the accusation against him. Defendant submits that in this cause the defendant's right to be apprised under the Sixth Amendment has in fact been violated by the trial court's denial of even the simple matters inquired into by the bill of particulars. A contrary holding flies directly into the Committee's announced purpose in regard to the amendment of Rule 7(f): that the district courts henceforth view motions for bill of particulars more generously.

II. The Trial Court Erred in Not Striking the Testimony of Beverly Harrell.

The only evidence in linking the defendant Duncan to the 1961 Chevrolet Impala forming the basis of Count I consisted of the testimony of the government's informant Menz (See Statement of the Case, pp.4-5, supra) and the extremely tenuous connection supplied by the witness Harrell. At no time did Menz's testimony place Mr. Duncan in physical possession of the automobile or explain the role of Rainey.

In an effort to connect the defendant Duncan to the automobile, the government called as a witness one Beverly Harrell who was renting a room from Mr. Duncan in the

fall of 1965. Mrs. Harrell was asked if, while living at the Duncan residence, she saw a 1961 Chevrolet at the house. Her answer was:

> "I seen a Chevrolet. I can't say exactly 1961, but it is approximately close." (T. 63).

Defense counsel then objected to further inquiry until further foundation was laid; "approximately 1961 is not material."* Later, by leading the witness, the government established that the year was "approximately" 1961 (T. 64). The witness then testified that she drove the car on one occasion without the use of a key which was presumably offered to tie in to the testimony of Menz that he had been able to steal the car without the proper key (T. 33); this ignores, of course, the well-known fact that Chevrolets of this vintage can be started without a key if the ignition is

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*Generally, a motion to strike must be preceded by an objection. In this case defense counsel promptly objected as soon as the lack of foundation appeared. Before this, defense counsel had no way of knowing that adequate foundation could not be laid. Thus the myriad of cases holding that a motion to strike cannot be granted unless preceded by a valid objection are inapposite, see e.g. Benson v. United States, 146 U.S. 325, 13 Sup. Ct. 60, 36 L. Ed. 991 (1892). Since the testimony of the witness was related only to the 1961 automobile, and no other aspect of the case, the motion to strike was properly directed to the witness's entire testimony, cf. Lewis v. State, 55 Fla. 54, 45 So. 998 (1908).

left in the on or off position rather than in the lock position (Hurst testimony, T. 78).

Following her direct testimony, defense counsel renewed his motion to strike Harrell's testimony as unconnected and because there had been "no identification with the vehicle in question" (T. 65). Later on cross-examination, the witness's lack of familiarity with the vehicle she drove and the tenuousness of her testimony was again established.

"Q I believe you said that you thought this was approximately a 1961 Chevrolet. Was it approximately a 1962 Chevrolet?

"A Well, I couldn't say exactly.

"Q Was it approximately a 1960 Chevrolet?

"A Yes.

"Q What you can honestly say, it was a white Chevrolet?

"A Oh, yes, the one I drove was a white Chevrolet.

"Q Was it a two-door, four-door?

"A I can't be positive now.

"Q And do you recall what the interior was?

"A Oh, average. Nothing rich, real rich.

"Q Can you tell us the style? Was it a Supersport?

"A It wasn't anything sporty.

"Q What?

"A It wasn't anything sporty." (T. 67-68).

Defense counsel again moved at the end of the government's case to have the testimony stricken (T. 109-111). The motion was again denied (T. 110-111).

Again, of course, we are in the area of trial court discretion; again defendant submits that the lower court abused its discretion in not striking the Harrell testimony. As in the case of denial of a bill of particulars, the trial court's discretion in this area is not unlimited. Many recent federal and state decisions attest that material improperly in the record and not struck upon demand constitutes good grounds for reversal of an otherwise varied conviction. Sumrall v. United States, 360 F.2d 311 (10th Cir. 1966); Torres v. United States, 333 F.2d 99 (10th Cir. 1964); Massei v. United States, 241 F.2d 895 (1st Cir. 1957) affirmed 355 U.S. 595, 78 Sup. Ct. 495, 2 L. Ed. 2d 517 (1958); United States v. Venuto, 182 F.2d 519 (3rd Cir. 1950); People v. Lewis, 152 Cal. App. 2d 824, 313 P.2d 972 (1957); Cole v. State, 109 Ga. App. 576, 136 S.E.2d 483 (1964); Pruitt v. State, 216 Tenn. 686, 393 S.W.2d 747 (1965).

Although no case precisely on point has been located, several of the foregoing cases provide useful illustrations of circumstances which warrant exclusion, upon motion, of evidence improperly before the jury. In Sumrall v. United States, supra, the trial court refused to strike

a police officer's inadmissible reference to the defendants' prior records. Although the evidence of guilt was "overwhelming," the appellate court reversed, refusing to regard the error as harmless. The evidence of prior criminal records improperly admitted in the Sumrall case may be inherently more objectionable than the evidence of Mrs. Harrell allowed to stand by the trial court in the instant case. Its total effect on the outcome of the case was conceivably no greater, however, since the only evidence truly linking the defendant to the automobiles, other than that coming through the lips of an informer in the control of the government who had testified for the prosecution before (T. 52), was Mrs. Harrell's vague reference to a white Chevrolet of uncertain age she drove in the "early fall" of 1965. In United States v. Venuto, supra, it was held to be error not to strike a government witness's testimony regarding his preparation of a statement of the defendant's net worth when, upon cross-examination, it appeared that the witness did not have information essential to such a tabulation. In other words, the holding fairly stands for the well-known proposition that a lay witness should not be permitted to give testimony other than that within his own knowledge.

Equally interesting and pertinent to this discussion are such state cases as Cole v. State, supra, and People v.

Lewis, supra, both of which hold that where the witness's testimony is without proper predicate, as in the instant case, it should be stricken. In Cole, a larceny of an automobile case, the witness testified that he knew the defendant lived in the house in question. Upon examination it turned out that the witness's statement was not derived from his own personal knowledge. It was held error not to exclude the testimony. Likewise, in Lewis, a witness's statements as to the defendant's reputation were held properly excluded when it was demonstrated that the witness's knowledge of the defendant's reputation was limited to the military base at which he served. The defendant does not contend that these cases are precisely on point with the instant facts; however, these cases do stand for the proposition, well established in the common law, that a witness should only be allowed to testify to matters clearly within his personal knowledge. These cases also suggest that the exclusion or admission of evidence will receive greater appellate scrutiny in criminal cases than in civil cases.

In the instant case the witness Harrell was permitted to testify, in effect, despite timely objection as soon as the infirmity appeared, to a matter not within her knowledge: that the car she drove in 1965 was the

1961 Chevrolet referred to in Count 1. This testimony regarding possession of the automobile by the defendant was particularly critical since uncorroborated by any other witness and should have been stricken upon the defendant's timely motion. Understandably, the prosecution did not fail in its final argument to emphasize Mrs. Harrell's testimony, particularly the fact that the car could be driven without a key (T. 124-25, 139).

CONCLUSION

We respectfully submit that the failure of the government to provide the defendant with the particulars requested violated his right to be apprised of the nature and cause of the accusation and violated his rights under the Sixth Amendment. Similarly, and independently, the refusal of the court to strike the vague and tenuous testimony of the witness Harrell, who offered the only testimony at all corroborative of the government's informer as to Duncan's participation in the offenses, was so prejudicial as to require reversal of the proceedings below.

LEWIS ROCA BEAUCHAMP & LINTON

By John J. Flynn
Robert A. Jensen

Attorneys for Appellant

June, 1967

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Ciruit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Robert A. Jensen

CERTIFICATION OF DELIVERY

Robert A. Jensen, one of the counsel for the defendant William Warden Duncan hereby states that he delivered three copies of the foregoing Appellant's Brief to the United States Attorney, Federal Building, Phoenix, Arizona, this day, June 9, 1967.

Robert A. Jensen

APPENDIX

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, Plaintiff, vs. WILLIAM WARDEN DUNCAN and JUDSON WESLEY RAINEY, Defendants.	NO. C-17477-PCT. MOTION FOR BILL OF PARTICULARS (Oral Argument Requested)

William Warden Duncan, one of the defendants in the above entitled matter, moves the Court for an order requiring the Government to furnish the said defendant, within a time therein specified, a written bill of particulars as to the following matters alleged in the Indictment herein, without whic particulars the defendant is not effectively informed of the charges filed against him and cannot adequately prepare his defense. The movant requests the right to amend this motion after the government's bill of particulars is filed. Without knowing the precise charges against this defendant, it is impossible to state the exact items which may in the future be material to the preparation of his defense or give the reasons and grounds for their production.

1. From whom does the Government allege William Warden Duncan and Judson Wesley Rainey received the 1961 Chevrolet Impala as alleged in Count I?

2. Where does the Government claim that the 1961 Chevrolet Impala was concealed as alleged in Count I?

3. Is it contended by the Government that the defendant William Warden Duncan drove the 1961 Chevrolet Impala referred to in Count I?

4. If the answer to question No. 3 above is "yes", set forth the date or dates on which such car was driven and the places from which and to which the car was driven by the said defendant.

5. Is it contended by the Government that the defendant Judson Wesley Rainey drove the 1961 Chevrolet Impala referred to in Count I?

6. If the answer to question No. 5 above is "yes", set forth the date or dates on which such car was driven and the places from which and to which the car was driven by the said defendant.

7. Where within the State and District of Arizona is it contended by the Government that the defendants received the 1961 Chevrolet Impala as alleged in Count I?

8. Has the Government ever charged any person other than the named defendants with the receipt or concealment of the 1961 Chevrolet Impala referred to in Count I of the Indictment?

9. If the answer to question No. 8 is "yes", set forth the name and address of the person so charged.

10. What is the serial number of the 1961 Chevrolet Impala referred to in Count I of the Indictment?

11. From whom does the Government allege William Warden Duncan and Judson Wesley Rainey received the 1964 Chevrolet Impala Supersport as alleged in Count II?

12. Where does the Government claim that the 1964 Chevrolet Impala Supersport was concealed as alleged in Count II?

13. Is it contended by the Government that the defendant William Warden Duncan drove the 1964 Chevrolet Impala Supersport referred to in Count II?

14. If the answer to question No. 13 above is "yes", set forth the date or dates on which such car was driven and the places from which and to which the car was driven by the said defendant.

15. Is it contended by the government that the defendant Judson Wesley Rainey drove the 1964 Chevrolet Impala Supersport referred to in Count II?

16. If the answer to question No. 15 above is "yes", set forth the date or dates on which such car was driven and the places from which and to which the car was driven by the said defendant.

17. Where within the State and District of Arizona is it contended by the Government that the defendants received the 1964 Chevrolet Impala Supersport as alleged in Count II?

18. Has the Government ever charged any person other than the named defendants with the receipt or concealment of the 1964 Chevrolet Impala Supersport referred to in Count II of the Indictment?

19. If the answer to question No. 18 is "yes", set forth the name and address of the person so charged.

20. What is the serial number of the 1964 Chevrolet Impala Supersport referred to in Count II of the Indictment?

21. Does the Government know of or have in its possession evidence favorable to the defendant?

22. If the answer to question No. 21 above is "yes", set forth the nature of such evidence, its present location, and the name and address of all persons having or claiming to have information regarding such evidence.

DATED this 6th day of October, 1966.

LEWIS ROCA SCOVILLE BEAUCHAMP & LINTON

By s/ Robert A. Jensen
Robert A. Jensen
Attorneys for Defendant Duncan
900 Title & Trust Building
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[Memorandum of Points and Authorities Omitted]

Copy of the foregoing Motion
and Memorandum mailed this
6th day of October, 1966, to:

WILLIAM COPPLE, Esq.
United States Attorney
United States Court House
Phoenix,Arizona

s/ ROBERT A. JENSEN
Robert A. Jensen